

**Dissenting Views to Accompany H.R. 3509  
the “Workplace Goods Job Growth and Competitiveness Act of 2005”**

We strongly oppose H.R. 3509, the “Workplace Goods Job Growth Competitiveness Act of 2005,” which would preempt state law to establish a nationwide 12-year statute of repose for “durable goods,”<sup>1</sup> thereby barring any recovery by employees for death or personal injury stemming from an accident to such goods.<sup>2</sup> H.R. 3509 is opposed by organized labor groups, such as the AFL-CIO<sup>3</sup> and public interest groups, such as Public Citizen, Alliance for Justice, Center for Justice & Democracy, Consumer Federation of America, Consumers Union, Public Citizen, U.S. Public Interest Research Group<sup>4</sup>, and the National Conference of State Legislatures<sup>5</sup>.

Like many tort “reforms” being sought by the majority, H.R. 3509 would discourage corporate responsibility by cutting off the rights of injured victims to obtain full recovery. A statute of repose is perhaps the most perilous type of such tort “reform” because it operates to totally cut off any right of action against the manufacturer after a 12-year period has elapsed, regardless of whether or not the potential injured party has suffered an injury yet and regardless of how long the product was built to last.<sup>6</sup> The legislation also raises a host of serious

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<sup>1</sup>“Durable goods”are defined as products that are expected to last more than three years and that are used in a trade or business, or by the government.

<sup>2</sup>The legislation does not apply to workers if they are ineligible to receive workers’ compensation, or if the injury involves a “toxic harm.” The legislation also provides exceptions for (1) motor vehicles, vessels, aircraft or trains used primarily to transport passengers for hire, (2) actions based on an express warranty in writing for longer than 12 years, and (3) the limitation period established by the General Aviation Revitalization Act of 1994. The statute of repose, which applies 12 years after the first purchase or lease of the durable good, also applies to employer actions with regard to “property damage,” but not other types of harm to employers, such as business interruption.

<sup>3</sup>See Letter from William Samuel, Director, Department of Legislation, American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”), to Chairman James Sensenbrenner, Jr. And Ranking Member John Conyers Jr. (March 27, 2006) (on file with the Democratic staff of the House Judiciary Committee) [hereinafter AFL-CIO Letter].

<sup>4</sup>See Letter from Alliance for Justice, Center for Justice & Democracy, Consumer Federation of America, Consumers Union, Public Citizen, and U.S. Public Interest Research Group (“U.S. PIRG”) to House Judiciary Committee Members (March 28, 2006)(on file with the Democratic staff of the House Judiciary Committee)[Public Interest Group Letter].

<sup>5</sup>See Letter from the National Conference of State Legislatures to Chairman James Sensenbrenner and Ranking Member John Conyers, Jr. of the House Committee on the Judiciary (March 28, 2006)(on file with the Democratic staff of the House Judiciary Committee).

<sup>6</sup>See generally, 63A Am. Jur. 2d, Products Liability §§ 921-924; Am. Law. Prod. Liab. 3d, Limitation of Actions: Statues of Repose §§ 47:55 - 47:76.

federalism and constitutional issues. For these and the reasons set forth herein, we dissent from H.R. 3509.

**I. H.R. 3509 Harms American Workers by Denying Them Adequate Compensation For Their Injuries and Treating Them Differently Than Other Harmed Parties**

H.R. 3509 denies workers adequate compensation for their injuries. As the AFL-CIO has written, the bill “is purely and simply an effort to discriminate against workers injured or killed on the job by preventing them or their survivors from recovering damages from a manufacturer or seller of durable goods more than 12 years after the durable good was delivered to its first purchaser or lessee.”<sup>7</sup>

While H.R. 3509 applies only to injured workers who are covered by workers’ compensation, for those workers, recovery for harm suffered can be drastically limited. This is because state workers’ compensation laws usually only provide for medical costs and limited disability payments -- they do not provide for compensation for non-economic damages, such as loss of fertility, loss of a limb, permanent disfigurement and other forms of pain and suffering.<sup>8</sup> As the public interest groups explain in their letter:

H.R. 3509 would override many state laws that allow injured workers to sue manufacturers of older defective products and recover full damages for the harm caused. It would discriminate against workers, especially those in states that have cut their workers’ compensation benefits in recent years. Workers who do receive workers’ compensation benefits will, nonetheless, be denied any damages for their pain and suffering.<sup>9</sup>

H.R. 3509 also unfairly singles out American workers, treating them differently from other injured persons. Thus, for example, if a 25-year old elevator malfunctions and crashes, killing a custodian and a visitor, the bill would allow the visitor’s family to sue, but would bar the custodian’s family from seeking compensation in court. This is illogical and inequitable and provides an unjustified economic windfall to the elevator manufacturer.

Moreover, it is inherently unfair in that the statute of repose only applies to workers injured on the job -- while business owners would still have their full rights under state law to

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<sup>7</sup>See AFL-CIO Letter.

<sup>8</sup>See, e.g., *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983). Even in the area of economic damages, workers compensation laws can be lacking. For example, a 1998 study of California’s workers’ compensation laws by the RAND Institute for Civil Justice concluded that because wage losses persist and benefit payments run out, workers compensation benefits compensated less than 40% of workers’ full economic losses over a five-year period after the accident.

<sup>9</sup>Public Interest Group Letter.

recover for business interruptions due to defective machinery.<sup>10</sup> As the Professor Andrew Popper states in his testimony before the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law:

The bill punishes consumers and workers, not for filing at the wrong time or bringing claims with questionable merit, but rather for being injured by a defective product at the wrong moment in time.<sup>11</sup>

Our concerns are not theoretical, they are very real. The following are just two examples of actual cases that would have been completely barred under this legislation:<sup>12</sup>

- ! In California in 1995, Reginaldo Gonzalez, 47, was operating a printing press designed and manufactured in 1973 by Heidelberg, Inc., when his hand became caught in the rollers, resulting in the traumatic amputation of his arm at the shoulder. The company added safeguards to this printing press model in 1974 and again in 1980, but never took steps to notify prior owners of the machine's dangerous defect. As a result, by 1995, at least eight pressmen had their arms amputated or crushed while operating pre-1974 presses. A jury found the early design defective and the company's conduct negligent, and awarded Gonzalez \$4.1 million. *Under H.R. 3509, this case would have been barred, and the manufacturer of the rollers would have no legal responsibility to minimize the dangers inherent in their product.*
- ! In Massachusetts, on April 13, 1984, John Jones was bending material in a press brake designed and manufactured by Cincinnati, Inc., in 1966 when the unguarded press suddenly closed, crushing his hands. The court awarded Jones \$500,000, finding that Cincinnati was aware that press operators would have their hands in vulnerable positions while operating this machine, and that the manufacturer was reckless for not incorporating safeguards (available to the manufacturer in 1966) into the press's design that could have prevented the accident. *Again, under H.R. 3509, Mr. Jones would have*

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<sup>10</sup>Although, as noted, businesses would be entitled to bring business interruption lawsuits, they would be barred from recovery for property damage when older equipment fails and damages the workplace, and they would no longer be able to recover the funds paid to an injured employee through workers' compensation. Currently, employers may recover these workers' compensation payments from any damages awarded the employee in court, ensuring that employers and workers' compensation systems do not subsidize manufacturers of defective products.

<sup>11</sup>*See Hearing on H.R. 3509, the Workplace Goods Job Growth and Competitiveness Act of 2005 Before the Comm. on Judiciary, Subcomm. on Commercial and Administrative Law (March 14, 2006)(Statement of Professor Andrew Popper, American University, Washington College of Law)[hereinafter Professor Popper Testimony].*

<sup>12</sup>*See Hearing on H.R. 1875 and H.R. 2005 Before the Comm. On the Judiciary, 106<sup>th</sup> Cong. (1999)(Statement of Tom Bantle, Legislative Attorney, Public Citizen)[hereinafter Public Citizen Testimony].*

*been awarded no compensation for the loss of his hands, other than the minimal recovery available under workers compensation.*

In addition to harming workers, the bill transfers legal responsibility from the manufacturer of the machine tool to the employer, providing a legal disincentive for such manufacturers to publicize and fix defective older products that are still in use. Moreover, under the legislation a fix that requires a new component might set a new 12-year clock running, providing further disincentives for a manufacturer to cure product defects late in the statutory period.

## **II. H.R. 3509 Raises Serious Federalism As Well as Possible Constitutional Concerns**

We are also concerned by the majority's failure to consider or take into account the very serious federalism and constitutional concerns raised by this legislation. Since Congress has traditionally deferred to the states regarding tort law in general and product liability law in particular, preempting state law regarding statutes of repose would constitute a dramatic shift in this balance.<sup>13</sup> Noting this federalism concern, Assistant Attorney General Eleanor D. Acheson testified at the hearing of a previous incarnation of this legislation:

This proposed national statute of repose would extinguish valid lawsuits that would otherwise be permitted to proceed under state law. This sort of intrusion into the availability of state tort remedies is inappropriate absent compelling and well-documented evidence that the defendants' need for civil immunity outweighs the strong policy that individuals and businesses be able to seek relief for their injuries.<sup>14</sup>

It should therefore come as no surprise that a whole host of constitutional concerns are also raised by the legislation. First, the bill -- which contains no interstate commerce jurisdictional requirement -- may run afoul of the constitutional requirement under Article I, clause 8,<sup>15</sup> limiting congressional authority to the regulation of interstate commerce and under the Tenth Amendment, reserving all of the unenumerated powers to the States.<sup>16</sup> This is a particular

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<sup>13</sup>Supporters may argue that the General Aviation Revitalization Act of 1994 should serve as a precedent with its federal 18 year statute of repose, however, that law was specifically crafted to react to the specific circumstances in the general aviation industry, such as ubiquitous federal regulation and the fact that private planes are fully rebuilt on a periodic basis.

<sup>14</sup>*See Hearing on H.R. 1875 and H.R. 2005 Before the Comm. On the Judiciary*, 106<sup>th</sup> Cong. (1999)(Statement of U.S. Department of Justice Assistant Attorney General Eleanor D. Acheson)[hereinafter DOJ Testimony].

<sup>15</sup>Article I, Section 8 of the Constitution provides, *inter alia*, "Congress shall have Power ... To regulate Commerce with foreign Nations and among the several States ... ." U.S. Const. art I, § 8, cl. 3.

<sup>16</sup>The Tenth Amendment provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the

concern in light of recent Supreme Court decisions such as *Lopez v. United States* (striking down a federal gun-free school zone law which had no interstate commerce requirement),<sup>17</sup> *New York v. United States*<sup>18</sup> and *Printz v. United States*<sup>19</sup> in which the Court showed extreme scepticism regarding Congress' ability to dictate state legal policies.

There is also the potential that H.R. 3509 may implicate Fifth Amendment due process<sup>20</sup> and Seventh Amendment right to trial<sup>21</sup> issues. The due process concern stems from the fact that the leading Supreme Court case, *Duke Power Co. v. Carolina Envtl. Study Group*,<sup>22</sup> left open the question as to whether it is was necessary for federal tort laws to provide an offsetting legal

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people.” U.S. Const. amend X.

<sup>17</sup>514 U.S. 549 (1995). In *Lopez*, one of the problems with the school gun ban was that it contained “no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce.” When Congress acted in 1996 to remedy the constitutional infirmity in the school gun ban invalidated by *Lopez*, it limited the law to firearms that have “moved in or that otherwise [affect] interstate or foreign commerce.” 18 U.S.C.A. § 922(q)(2)(A) (1994) (amended 1996). See also, *Employers Liability Cases*, 207 U.S. 463 (1907) (striking down federal tort law concerning common carriers which preempted state tort law on interstate commerce grounds); T.R. Goldman, *Lopez Gives Tort Reform a New Weapon*, *Legal Times*, May 8, 1995, Tort Reform Notebook, at 2 (quoting Harvard Law School Professor Laurence Tribe for the proposition that “*Lopez* is a reminder that the commerce clause is not a blank check. As such, it will operate to at least raise significant questions about some of the elements of proposed tort reforms pending in Congress”).

<sup>18</sup>505 U.S. 144 (1992) (invalidating a federal law requiring States to assume ownership of radioactive waste or accept legal liability for damages caused by the waste because it was found to “commandeer the legislative processes of the States”).

<sup>19</sup>521 U.S. 898; 117 S.Ct. 2365; 138 L.Ed. 2d 914; 65 U.S.L.W. 4731 (U.S. June 27, 1997)(invalidating portions of the Brady Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

<sup>20</sup>The Fifth Amendment provides that no person shall be “deprived of life, liberty, or property without due process of law,” a proscription which has been held to include an equal protection component. U.S Const. amend. V.

<sup>21</sup>The Seventh Amendment provides, “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend VII.

<sup>22</sup>439 U.S. 59, 87-88 (1978) (upholding Price-Anderson Act which, *inter alia*, capped liability at federally supervised nuclear power plants and mandated waiver of defenses in event of nuclear accident).

benefit or *quid pro quo* to justify the deprivation of tort rights (which the legislation does not appear to do). As for the Seventh Amendment, although the right to jury trial has been found not to apply to federal limitations imposed on state courts, the Seventh Amendment could apply to diversity cases brought in federal court, particularly if a statute of repose is seen as extinguishing a “common law” right.<sup>23</sup> In this regard, it is telling that in nearly half of the states that have enacted product liability statutes of repose, the state supreme courts have overturned them because they were found to violate state constitutional requirements relating to due process, equal protection and open access to courts.<sup>24</sup>

### **Conclusion**

H.R. 3509 creates a statute of repose that unfairly singles out American workers and denies them full recovery for their injuries. Under the legislation, American workers maimed and killed by defective products would find themselves limited to workers compensation remedies and totally barred from obtaining damages for their pain and suffering, unlike every other category of injured person.

This legislation is being propounded by the majority in the absence of any credible evidence that a systemic problem exists with regard to lawsuits concerning durable goods and with no corresponding understanding of the bill’s impact on workers, their families, and their employers. In our view, we do not believe a threshold has been met which would justify such a significant intrusion into the state product liability system.

### **III. Description of Amendments Offered by Democratic Members**

During the markup, there were nine amendments offered by Democratic members. One amendment by Mr. Conyers, five amendments by Mr. Scott, one by Mr. Schiff, one by Ms. Jackson-Lee and one by Ms. Waters.

1. Amendment offered by Rep. Conyers:

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<sup>23</sup>See *Tull v. United States* where the Seventh Amendment was found not apply to the statutory civil penalty caps in the Clean Water Act, 481 U.S. 412 (1987), since the assessment of civil penalties involved neither the “‘substance of a common-law right to a trial by jury’ nor a ‘fundamental element of a jury trial.’” On the other hand, in the 1935 case *Dimick v. Schiedt*, 293 U.S. 474 (1935), the Court found unconstitutional the Federal practice of additur, because increasing the amount of a jury award was a question of “fact” protected by the Seventh Amendment.

<sup>24</sup>See e.g., *Lankford v. Sullivan, Long & Hagarty*, 416 So.2d 996 (Ala. 1982), *Hazine v. Montgomery Elevator Co.* 861 P.2d 625 (Ariz. 1993), *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983). Other states throwing out statute of repose laws include Kentucky, North Dakota, Rhode Island, South Dakota, and Utah.

Description of amendment: The amendment would set forth requirements for notice to employees before a manufacturer or seller sends work outside the United States, and would exempt such companies from protection under this bill if the requirements are not met.

The amendment was defeated by a vote of 12 to 16. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Jackson Lee, Waters, Meehan, Schiff, Sanchez, Van Hollen, and Wasserman Schultz. Nays: Representatives Coble, Smith, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Hostettler, Inglis, Green, Forbes, King, Feeney, Franks, Gohmert, and Sensenbrenner.

2. Amendment offered by Rep. Scott:

Description of amendment: The amendment would exempt from the bill's purview any action arising from the defendant's "willful, reckless, or wanton disregard for life or property."

The amendment was defeated by a vote of 14 to 15. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Meehan, Weiner, Schiff, Sanchez, Van Hollen, and Wasserman Schultz. Nays: Representatives Coble, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Hostettler, Inglis, Green, Keller, Forbes, King, Feeney, Franks, and Sensenbrenner.

3. Amendment offered by Rep. Schiff:

Description of amendment: The amendment would exempt from the bill's purview a civil action against a manufacturer or seller of a durable good who "fraudulently concealed a defect in the durable good."

The amendment was agreed to by voice vote.

4. Amendment offered by Rep. Scott:

Description of amendment: The amendment would preempt any state law that establishes a statute of repose for a period less than 12 years. It would also clarify that the bill does not preempt any state law that prohibits a statute of repose or impose a statute of repose on states that do not have such statutes already in place.

The amendment was defeated by voice vote.

5. Amendment offered by Rep. Scott:

Description of amendment: The amendment would change the statute of repose in the bill from a term of 12 years to 18 years.

The amendment was defeated by voice vote.

6. Amendment offered by Ms. Jackson-Lee:

Description of amendment: The amendment would exempt from the bill's purview a civil action against a manufacturer or seller that "on or after the date of the enactment of this Act, does not pay its employees a minimum wage of at least \$7.25 per hour."

The amendment was defeated by a vote of 14 to 20. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Meehan, Wexler, Weiner, Schiff, Sanchez, and Wasserman Schultz. Nays: Representatives Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Bachus, Hostettler, Inglis, Keller, Issa, Forbes, King, Feeney, Franks, Pence, Gohmert, and Sensenbrenner.

7. Amendment offered by Ms. Waters:

Description of amendment: The amendment would exempt from the bill's purview any action arising "out of an accident involving a durable good if the use of such durable good by the claimant is required by the claimant's employer."

The amendment was defeated by a vote of 15 to 20. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Meehan, Wexler, Weiner, Schiff, Sanchez, Van Hollen, and Wasserman Schultz. Nays: Representatives Coble, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Bachus, Hostettler, Inglis, Green, Keller, Issa, Forbes, King, Feeney, Franks, Pence, Gohmert, and Sensenbrenner.

8. Amendment offered by Mr. Scott:

Description of amendment: The amendment would exempt from the bill's purview any action arising "out of an accident involving a durable good that has a normal life expectancy of more than 12 years."

The amendment was defeated by voice vote.

9. Amendment offered by Mr. Scott:

Description of amendment: The amendment would strike paragraph (a) (1) from Section 2, thereby allowing actions for damage to property regardless of whether the accident occurred more than 12 years after the date on which the durable good was delivered.

The amendment was defeated by voice vote.

John Conyers, Jr.  
Robert C. Scott  
Zoe Lofgren  
Sheila Jackson Lee  
Martin T. Meehan  
William D. Delahunt